



May 2, 2022

Ms. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Submitted via email: rule-comments@sec.gov

**Re: Short Position and Short Activity Reporting by Institutional Investment Managers
Release No. 34-94313 / File No. S7-08-22¹**

Dear Ms. Countryman:

Bloomberg L.P.² respectfully submits this letter in response to the above-referenced proposal by the U.S. Securities and Exchange Commission (“SEC” or the “Commission”) to require institutional investment managers that meet or exceed a specified reporting threshold to report specified short position data and short activity data for equity securities (the “Proposal”).

Overview

The Proposal is designed to supplement the short sale data that is currently available through the Financial Industry Regulatory Authority (“FINRA”) and most exchanges.³ We know that many in the industry have raised questions regarding whether the costs of expanded reporting outweigh the public benefits. We believe those questions should be addressed. We want to raise two additional relevant issues that have broad application outside of the context of whether this reporting activity should be expanded – namely (i) the continued problems in the dissemination of existing short sale information by FINRA and the listing exchanges and (ii) the Commission’s positive efforts to provide the market with the ability to choose identifiers.⁴

¹ Short Position and Short Activity Reporting by Institutional Managers, SEC Exch. Act Release No. 34-94313 (Feb. 25, 2022), available at <https://www.sec.gov/comments/s7-11-21/s71121-20109566-263925.pdf> (the “Proposal”).

² Bloomberg – the global business, financial information, and news leader – increases access to market data by connecting market participants of all stripes to a dynamic network of information, people, and ideas. The company’s strength – quickly and accurately delivering data, news, and analytics through innovative technology – is at the core of the Bloomberg Terminal. The Terminal provides financial market information, data, news, and analytics to banks, broker-dealers, institutional investors, government bodies, and other business and financial professional worldwide.

³ Proposal at 9.

⁴ We have previously brought the issues discussed in this letter to the attention of FINRA in our response to its request for public comments on potential enhancements to its short interest position program. See Letter from

The current system for collecting and distributing short sale data lacks transparency and suffers from monopolistic prices.

FINRA currently collects and aggregates short sale-related information from its members pursuant to FINRA Rule 4560.⁵ FINRA, for a fee, then shares the data with the applicable listing exchange. The listing exchanges are then responsible for making that data available to the broader investing market for their respective securities. Currently, the Nasdaq Stock Market LLC (“Nasdaq”) and New York Stock Exchange LLC (“NYSE”) (collectively, the “exchanges”) are the only two exchanges that are responsible for disseminating the short interest data for exchange-listed securities. Both exchanges charge customers a fee for access to the short interest data, and they are the sole source of data for each data set.⁶

There are several significant concerns arising out of this arrangement. For one, as the Commission notes in the Proposal, the fees that the exchanges charge for the short interest data may make it difficult for some investors to access.⁷ This fact alone, in the context of a monopoly data product, is cause for concern and should provide grounds for a deeper Commission review.

It is also worth noting that there is almost a complete lack of transparency as to how the fees are established, whether the resulting fee levels comply with the applicable requirements set forth under the Securities Exchange Act of 1934 (“Exchange Act”), and for that matter, what the fees even are. This lack of transparency raises a number of additional concerns.

Bloomberg L.P. to FINRA regarding short interest position reporting and other changes related to short sale reporting, dated September 30, 2021, *available at* https://www.finra.org/sites/default/files/NoticeComment/Bloomberg_Gregory%20Babyak_21-19_9.30.2021%20-%20Regulatory%20Notice%2021-19%20Bloomberg%20L.P.%20Comment%20Letter%20%282021.09.30%29.pdf.

⁵ FINRA Rule 4560 does not provide for how the short sale data would be distributed or what FINRA may do with it.

⁶ FINRA currently provides the short position information for OTC equity securities for free on its website. However, the Commission should note that FINRA is in the process of switching to a new application programming interface (“API”), which now requires registering for a log-in credential (individual/public, firm, or organization) to access data, including the short sale data. There are monthly fees associated with these credentials, with usage capped at 10GB per month: \$0 for public (non-commercial purpose only); \$2,750 for firm; and \$3,750 for organization. FINRA API Developer Center Fees (<https://developer.finra.org/fees>). The API’s terms of service include additional restrictions on data usage, including a prohibition on the redistribution of data. FINRA API terms of Service 3.3 (<https://developer.finra.org/finra-api-terms-service>). This development is potentially concerning because these changes to short sale data fees are occurring without FINRA making the requisite rule filings with the SEC and shows a hidden imposition of fees for data that was previously free for public consumption. We do note that the final migration date for the new API system is May 31, 2022 and there may be additional changes until that date. Reminder: FINRA API Platform Migrating to OAuth 2.0 Authentication (<https://developer.finra.org/news/reminder-finra-api-platform-migrating-oauth-20-authentication>).

⁷ Proposal at 43.

First, under Exchange Act Section 19(b) and Rule 19b-4 thereunder,⁸ SROs are required to file proposed rule changes with the Commission on Form 19b-4.⁹ Form 19b-4 is intended to elicit information necessary for the public to provide meaningful comment on proposed rule changes, including fee increases, and for the Commission to determine whether the proposed changes are consistent with the requirements of the Exchange Act and the rules and regulations thereunder as applicable to the SRO.¹⁰

Self-regulatory organizations have the burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.¹¹ Thus a fee filing proposal should fully and fairly describe the operation of the applicable fee in adequate detail – including its effect on market participants – so that the public can understand the fee filing proposal sufficiently to provide meaningful comment and the Commission can determine whether the proposal is consistent with the Exchange Act.¹² A fee filing must also address all relevant statutory requirements, including the requirements that the fees are: (1) reasonable;¹³ (2) equitably allocated;¹⁴ (3) not unfairly discriminatory;¹⁵ and (4) do not unduly burden competition.¹⁶

It appears that NYSE, despite charging fees for access to the short interest data, has never filed a proposed rule change with the Commission. In fact, NYSE does not even publicly publish the fees it charges for the short interest data anywhere, not even on its own website.¹⁷ As a result, there is little transparency with respect to NYSE's handling of the short sale data, and the

⁸ Exchange Act Section 19(b) and Exchange Act Rule 19b-4.

⁹ 17 CFR 249.819.

¹⁰ SEC Staff Guidance on SRO Rule Filings Relating to Fees at Section II (May 21, 2019), *available at* <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees> (“SEC Guidance on SRO Fee Filings”).

¹¹ SEC Rules of Practice, Rule 700(b)(3) (17 CFR 201.700(b)(3)).

¹² *See* Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Amending the Fee Schedule Assessed on Members to Establish a Monthly Trading Rights Fee, Exchange Act Release No. 86236, at 7 (June 28, 2019), *available at* <https://www.sec.gov/rules/sro/cboeedga/2019/34-86236.pdf>. *See also* SEC Staff Guidance on SRO Rule Filings Relating to Fees at Section II (May 21, 2019), *available at* <https://www.sec.gov/tm/staff-guidance-sro-rule-filingsfees>.

¹³ Exchange Act Sections 6(b)(4) and 15A(b)(5).

¹⁴ Exchange Act Sections 6(b)(4) and 15A(b)(5).

¹⁵ Exchange Act Sections 6(b)(5) and 15A(b)(6), Rule 603 of Regulation NMS.

¹⁶ Exchange Act Sections 6(b)(8) and 15A(b)(9).

¹⁷ The only way to know the amount of fees that NYSE charges for the short interest data and any subsequent increases is to fill out an order form that requires a log-in and generate what the data would cost.

Commission has been deprived of the opportunity to review the fees to ensure they meet the requirements of the Exchange Act.

Nasdaq, on the other hand, has previously filed a proposed rule change with the Commission and has disclosed the fees associated with access to its short interest information.¹⁸ However, the specifics pertaining to the fees (i.e., reasons for the fees and why the fees were set at the specified amount etc.) have not been addressed.

For example, Nasdaq filed a proposed rule change with the Commission in 2017 to raise the short interest data fees.¹⁹ According to the filing, the impetus for the fee increase arose when FINRA increased its annual charges for the receipt of short interest data. This increase in FINRA fees, according to the filing, translated to an increase to Nasdaq's cost of inputs in producing the Nasdaq short interest report.²⁰ We understand then from this filing that the exchanges pay FINRA for the right to distribute the short interest data, but the specifics of that arrangement, including the amount of any fees, are entirely undisclosed to the public.²¹ Without knowing more about these arrangements, it is impossible to determine whether the resulting fees imposed on market participants are fair and reasonable.

Second, FINRA, as the sole entity charged with the responsibility for collecting the short interest information, currently does not provide the data for listed securities to any entity other than the listing exchanges.²² So, in addition to the fact the fees charged by FINRA for the short interest data are unknown to the market, there is no prospect of competition from any substitute data product – because the data is only provided to two entities. Moreover, Nasdaq admittedly uses the short sale data to help attract order flow.²³ It is inappropriate for regulatory data – which

¹⁸ See Order Approving Proposed Rule Changes to Increase the Frequency of the Short Interest Reporting Requirements, SEC Release No. 34-55406, File No. SR-NASD-2006-131; SR-NYSE-2006-111; SR-Amex-2007-05 (Mar. 6, 2007), available at <https://www.sec.gov/rules/sro/nasd/2007/34-55406.pdf>. See also Nasdaq to Increase Frequency of Short Interest Reports in September of 2007, Nasdaq Data News #2007-53 (Aug. 22, 2007), available at <https://www.nasdaqtrader.com/TraderNews.aspx?id=nva2007-053>.

¹⁹ In 2017, the Nasdaq increased its fees by replacing the fee structure that used to be based on the frequency of distribution with a subscription service based on the number of subscribers. See Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Alter the Exchange's Fee Schedule for the Short Interest Report, SEC Release No. 34-81256. File No. SR-NASDAQ-2017-077 (July 28, 2017), available at <https://www.sec.gov/rules/sro/nasdaq/2017/34-81256.pdf> (“2017 Nasdaq Filing”).

²⁰ *Id.* at 5. For an unlimited external distribution of the short sale data, a distributor paid \$2,500 per month (a total of \$30,000 annually) prior to the 2017 Nasdaq Filing. Nasdaq increased this fee by twofold to \$7,500 per month (a total of \$60,000 annually) in 2017, citing an increase to its own undisclosed cost of getting the data from FINRA.

²¹ The 2017 Nasdaq Filing is the only public document that indicates that the exchanges pay any fees to FINRA for the short sale data.

²² See FINRA Regulatory Notice 21-19 (June 2021), available at <https://www.finra.org/sites/default/files/2021-06/Regulatory-Notice-21-19.pdf> (“FINRA Regulatory Notice 21-19”).

²³ 2017 Nasdaq Filing at 8.

broker-dealers are compelled to provide for free in furtherance of regulatory objectives – to be distributed and sold in this manner.

As the Commission focuses on potential changes to the available short position and short activity data, we feel the Commission should also consider the shortcomings of the existing system for gathering and disseminating the data. We note that FINRA recently requested comments on potential enhancements to its short sale reporting program, including consolidating the publication of short interest data that is reported to FINRA for both listed and unlisted securities and making the short interest files for all equity securities available free of charge on the FINRA website.²⁴ However, FINRA has thus far not taken any additional steps beyond this request for comment.

The use of any specific financial identifier should not be regulatorily mandated and competition among identifiers should be encouraged to benefit the industry as a whole.

We applaud the Commission’s the decision in the Proposal to promote industry choice in the use of financial identifiers, such as the Financial Instrument Global Identifier (“FIGI”), the Legal Identity Identifier (“LEI”), and CUSIP, as data elements to be collected and disseminated with respect to the short sale data. Because regulatory mandates to use a particular product raise costs and diminish innovation, the ability to choose the data identifier in regulatory reporting would be beneficial to the entire industry. Competition among financial identifiers would improve transparency and data quality, as well as eliminate burdensome costs. We encourage the Commission to promote competition among identifiers in other contexts as well.

FIGI, a unique, publicly-available identifier that covers financial instruments across asset classes that arise, expire, and change on a daily basis, was developed by Bloomberg to help solve licensing challenges and shortcomings in data organizations and governance that persist in the current regional-based security identifier numbering approaches.²⁵ FIGI became a free, open data standard in 2014 after Bloomberg assigned all rights and interests in FIGI to the Object Management Group (“OMG”), an international non-profit technology standards consortium.²⁶ FIGI is in the public domain with no commercial terms or restrictions on usage, and it is available free of charge for use by all market participants.²⁷ This is one of the many attributes

²⁴ FINRA Regulatory Notice 21-19.

²⁵ <https://www.omg.org/figi/>

²⁶ Press Announcement: “What’s in a Name? The Bloomberg Global ID Is Reborn as the FIGI” (Oct. 9, 2014), available at <https://www.bloomberg.com/company/press/whats-name-bloomberg-global-id-reborn-figi/>.

²⁷ FIGI is offered under the MIT Open Source License and we note that this dedication is formally embedded within the X9, ABNT, and OMG standard accreditations. The metadata term “dct:license” specifically outlines the application of the MIT Open Source license in the standard for the identifier and associated metadata. See ANSI X9.145.2021 for FIGI (2021) at 38, available at <https://x9.org/wp-content/uploads/2021/08/ANSI-X9.145-2021-Financial-Instrument-Global-Identifier-FIGI.pdf>. See also OMG FIGI v1.0 (2015) at p. 31, available at <https://www.omg.org/spec/FIGI/1.0/PDF>.

that sets FIGI apart from other similar identifiers that may result in the imposition of significant licensing fees for users.²⁸

In 2021, the Accredited Standards Committee X9 Inc. (“X9”), a non-profit organization accredited by the American National Standards Institute (“ANSI”), accepted the FIGI as a U.S. national standard and designated it as ANSI X9.145-2021.²⁹

One of the many benefits of the FIGI is that it enables interoperability between other identification systems and does not force the use of a single identification system. Enabling interoperability between different identification systems may actually lower costs when interacting between legacy systems, which may depend upon a single identifier, and newer systems, which typically have a more modern architecture. This interoperability reduces complexity, dependencies, and the costs of interacting across different user groups and communities that have different needs. This allows for better management of data, increases data quality, and facilitates the sharing of critical and universal information among different user communities without the costs associated with forcing changes to core systems and processes.

Indeed, organizations such as the Investment Adviser Association (“IAA”) have previously noted that increasingly burdensome fees have been imposed on investment advisers, investors, and others for the acquisition, retention, and use of certain identifiers. The IAA has asked the Commission to take a look at the policy of mandating the use of identification numbers in any regulations or regulatory filings as these practices may pose potential liability, subject users to the payment of burdensome fees, or are otherwise problematic.³⁰

We agree. Firms should be permitted to choose among identifiers and have the flexibility to adopt, integrate, or switch to other identifiers as appropriate. Choice in this area would allow firms to orient decisions around reducing costs of integration or realizing added benefits that offset any such integration cost concerns.

²⁸ Bloomberg L.P. is the Registration Agent for the OMG standard, under the auspices of OMG’s Financial Domain Task Force. There are currently two Certified Providers for the FIGI standard: Bloomberg and Kaiko. Press Announcement: “OMG Announces Kaiko to Expand FIGI Standard for Crypto Assets” (Jan. 20, 2021), *available at* <https://www.omg.org/news/releases/pr2021/01-20-21.htm>.

²⁹ Press Announcement: “ASC X9 Publishes U.S. Standard for the Financial Instrument Global Identifier” (Sept. 15, 2021), *available at* <https://www.bloomberg.com/company/press/asc-x9-publishes-u-s-standard-for-the-financial-instrument-global-identifier/>.

³⁰ See Letter from the Investment Adviser Association to the SEC, dated Sept. 29, 2020, at 6 (<https://www.sec.gov/comments/s7-08-20/s70820-7859973-223872.pdf>). See also Letter from the Investment Adviser Association to the SEC, dated Dec. 17, 2021, at 3 (<https://www.sec.gov/comments/s7-15-21/s71521-20109989-264314.pdf>).

We appreciate the Commission's willingness to consider our comments and would be pleased to discuss any questions you may have with respect to this letter.

Thank you.

Very truly yours,

A handwritten signature in black ink that reads "Gregory R. Babyak". The signature is written in a cursive, slightly slanted style.

Gregory Babyak
Global Head of Regulatory Affairs, Bloomberg L.P.